UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA **v.** **PANAYIOTIS KYRIACOU,** **Defendant.**	**Case No. 18 CR 102 (S-1)(KAM)**

SENTENCING MEMORANDUM ON BEHALF OF PANAYIOTIS KYRIACOU

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INTRODUCTION

This memorandum is submitted on behalf of defendant Panayiotis "Peter" Kyriacou, who is scheduled to be sentenced by the Court on March 17, 2020. Mr. Kyriacou appears before the Court as a first-time offender who immediately accepted responsibility for his actions and agreed to waive extradition. Other than his misplaced willingness to participate in misconduct suggested and pursued by an undercover agent, he has led a positive and productive life. Although undoubtedly wrong, his actions did not inure to his financial benefit or harm any victims. He has shown considerable remorse, felt tremendous shame, and yet has persevered in finding new employment while honestly informing his new employer of his circumstances. For these reasons and others more fully described below, we respectfully request that the Court impose a non-custodial sentence.

FACTUAL BACKGROUND

I. PERSONAL HISTORY

Panayiotis Kyriacou, who goes by "Peter", grew up in a tight-knit, middle class family on the outskirts of London. As a boy, Peter attended a local Greek school, as Greek heritage was and remains very important to his family. Michael Ellinas, the Headmaster of the school, recounts that Peter was originally placed back a level due to his weak language skills, but he did not accept that decision and worked diligently to gain the skills to join his peer group.[1] That perseverance and commitment are evident throughout Peter's young life, including how he has faced the charges in this case. Even after he completed his studies at the school, Peter volunteered his time on weekends as an assistant teacher and organizing events for the younger students at the school's

1. Attached as Exhibit A are letters from Maria Kyriacou (Peter's mother), Christopher and Nadia Kyriacou (Peter's siblings), Mehran Yadegari (Peter's supervisor at his current job), Ricco Komodikis (Peter's longtime friend), Michael Ellinas (Headmaster at Peter's grade school), and Maria Christofi (a judicial clerk in England).

annual sports day. Peter later earned a degree in accounting and finance from the University of Essex, and then a master's degree in banking and finance at Queen Mary University of London.

Peter lives with his parents and two siblings. His father, Gerolemos, owns and runs Snappy Snaps, a retail photo shop. His mother, Maria, also works at the family store and teaches at the local Greek school, where each of her three kids attended. Peter is the oldest of the three siblings, and has always served as a role model for his brother and sister. His siblings write that Peter "has always been a positive influence on us, pushing us to achieve as much as we can in our education, upholding our family-orientated values, and always encouraging to us to make the most out of everything we do in our lives." Peter has had the same impact on his friends, as his friend Ricco Komodikis attests: Peter "is always the first to offer guidance and support to his friends when needed."

The charges against Peter have had a profound effect on his life, diminishing the exuberance with which others knew him to live. His mother writes: "It pains me to see the light gone from his eyes, the guilt taking over his entire life and the remorse that he feels." His siblings have similar observations: "The usual 'bubbly' nature of Peter has been replaced by a man who feels shame and remorse for his actions."

The closeness of Peter's family has made him even more ashamed of his actions. He has brought significant anxiety to his parents and siblings, and shame on the family as a whole. Peter's sister has had difficulties with her studies due to the anxiety she has felt for Peter's circumstances since the charges were announced. As much as Peter is remorseful for his own actions and certainly regrets the consequences to his own life, he feels infinitely worse for the adverse impact his actions have had on his family. Yet Peter did not hide from what he had done or conceal from his family his wrongdoing, and they have remained remarkably supportive throughout.

Rather than allow the criminal charges to defeat him, Peter has tried his best to turn it into a teaching moment for himself and his brother and sister. He has picked himself up and found a paying job, even if not the type of job he originally thought he would have. After the charges were announced, Peter worked for a year in his father's photo store, and in April 2019 found a job as a recruiting consultant at Savant Recruitment in London. He has continued to try to be a role model for his brother and sister, to show that in adverse situations it is important to work hard and do the best you can to make things right. His longtime friend, Ricco Komodikis, writes that Peter has shown "drive and determination to get back on his feet", and is proud of Peter's "continued perseverance during a difficult time."

Peter's acceptance of responsibility for his actions, and his genuine remorse, are evident from the letters provided in support. Mr. Komodikis notes that Peter confided in him about his conduct and charges, and has shown "meaningful regret and remorse." Mr. Ellinas, the Headmaster at the local Greek school, likewise writes that Peter has shown "tremendous guilt and shame." Peter's supervisor at work, Mehran Yadegari, recognizes the courage Peter had to be upfront about his circumstances. He also recognizes the same traits in Peter in his new work environment that Michael Ellinas did when Peter was a schoolboy: "Peter is Very punctual, extremely reliable, has shown great commitment and dedication to his role (in a brand new industry to him), with a hunger and willingness to listen and learn." And in the short time that Peter has been working at his new job, he has garnered the same support from and made the same impressions on others as he has throughout his life. Mr. Yadegari writes: "I wouldn't hesitate twice about recommending Peter as a great, honest, hardworking person, colleague and friend."

II. THE NATURE OF THE OFFENSE

Mr. Kyriacou readily acknowledges that his role in helping the undercover agent advance the scheme proposed by the agent was wrong, unlawful, and unacceptable. We provide the following additional context for Mr. Kyriacou's participation.

Mr. Kyriacou was hired by Beaufort Securities in July 2015 as an entry-level business development junior, which essentially meant he cold-called potential clients for the firm. He was 23 years old at the time. His base salary was the equivalent of $32,000 per year. Although the PSR[2] indicates that the Beaufort firm had been involved in illicit conduct back to 2014 (PSR ¶¶ 6, 7), Mr. Kyriacou was not aware of any such conduct or allegations when he joined the firm. Indeed, while the PSR alleges that others at Beaufort were involved in pump and dump schemes involving at least 10 U.S. publicly traded stocks which generated more than $50 million for Beaufort clients, there is no allegation that Mr. Kyriacou was involved in such schemes, and in fact he was not.

During his first year at Beaufort, Peter also studied for his licensing exams, and in August 2016 he received his investment advice diploma from the Chartered Institute for Securities and Investments. At that point, Peter started a new role as a junior investment manager. Just by coincidence, at almost the same exact time, in late August 2016, an FBI confidential source sent an email to Beaufort's general email account to open up a brokerage account, and the inquiry was assigned to Peter as the most junior member of the team. If not for that random assignment, it is likely Peter would never have been involved in illegal conduct, charged with a crime, or appeared in a United States courtroom.

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2. It should be noted that defense counsel has not yet seen the final PSR, and as a result all references are to the initial PSR.

Peter was then introduced to the undercover agent, who would have been Peter's first client, and whom Peter was too eager to please. Over the course of the next 18 months, the undercover agent periodically contacted Peter by phone, and on occasion set up meetings with Peter in London. The undercover agent took Peter to expensive restaurants, and plied him with significant amounts of liquor. Peter does not consider the substantial alcohol an excuse for his actions, but there is no doubt that it had some impact on his willingness to go along with various suggestions by the undercover agent. One wonders why the undercover agent had to employ such techniques during the investigation.

Peter's willingness to engage in the undercover's proposed scheme was unacceptable. The various recordings make clear, however, that Peter's ultimate goal was not to engage in stock manipulation of U.S. securities. Rather, he hoped that the client (the undercover agent) would invest in legitimate stocks on the London stock exchange. Peter wanted to be a real, legitimate investment manager for a presumably wealthy client in the London securities market. While the undercover agent was often trying to steer the conversation one way, Peter was often trying to steer the agent to purchase "FTSE 100 blue chip stocks" and stocks "in the London market or main market."

What also becomes clear is that Peter did not seek to advance the undercover agent's proposed scheme on his own. When the undercover agent reached out to Peter, he unfortunately agreed to assist. But when each such call or meeting ended, Peter did little to move things along. Despite the fact that at times months would go by without any contact with the undercover agent or any relevant activity, Peter never reached out to the undercover agent to see if he would start to trade.

The same is true regarding the formation of offshore entities on behalf of the undercover agent. As noted in the PSR (¶ 22), in April 2017, after repeated advances by the undercover agent about forming offshore entities (a subject Peter knew nothing about), Peter learned from others at Beaufort that Beaufort had an office in Mauritius which could help establish offshore entities, and he passed that information on to the undercover agent. In July 2017, the undercover agent proposed a meeting with Peter in London, during which the agent again suggested that he would like to establish offshore entities. As a result of that lunch meeting and at the undercover agent's urging, Peter introduced the undercover agent by email to Vinesh Canaye, who worked in Beaufort's Mauritius office. Peter had never worked with Mr. Canaye prior to this introduction, and in fact had never met him. After this July 2017 email introduction, Peter had no involvement in forming any off-shore entities for the undercover agent. In fact, he did not know if Mr. Canaye had done anything for the undercover agent, and did not follow up with Mr. Canaye to find out. Indeed, during the two-and-a-half years he worked at Beaufort, Peter did not work with Mr. Canaye on any account other than the email introduction to the undercover agent, and never had another client form an offshore entity through the Mauritius office.

It wasn't until January 2018, seventeen months after the FBI first contacted Peter, that any U.S. stock trades (HD View 360, Inc.) were executed through Beaufort. Up to that point, Peter never reached out to the undercover agent to ask "when do we get started?" He never proposed that the undercover agent trade any U.S. security. Had the undercover agent not made the call, the trading at issue in this case simply never would have happened.

Over the course of approximately four weeks in early 2018, the undercover agent asked Peter to execute four small trades in HD View stock, each trade worth less than $1,000. Peter's role was to pass the order request to traders at Beaufort, and the traders executed the orders. Peter

had no role with the other side of the trade, and no role in any other effort to pump up the price or volume of the stock. As noted in Section I.A.1, below, the first trade might have had a small effect on the market for HD View stock, and the latter three trades had virtually no impact. Significantly, unlike most typical pump and dump schemes where each participant has a stake in the outcome of the trading, Peter did not stand to gain if the trading had any impact on the stock price. He was not offered and did not receive any stock or cash on the side as an incentive. He received absolutely nothing from the misconduct.

The Court should also be aware that Peter did not have any other U.S. clients. From the time he become a junior investment manager to the time the charges were announced in 2018, Peter had worked on behalf of approximately 50 clients at Beaufort. He estimates that 95% of the trading for those clients were on major U.K. stock exchanges, with virtually all of the remainder on other European exchanges. In the extremely rare instance that a client traded a U.S. security, it was a stock such as Apple on a major U.S. exchange. He did not have a single client who traded U.S. penny stocks, other than the undercover agent. The inclusion in the PSR of allegations that Beaufort Securities was involved in various pump and dump schemes should not be attributed to Peter. The fact that he did not have clients, other than the undercover agent, who traded in U.S. securities is indicative of his lack of participation in a broader scheme.

When the charges against him and others were made public in 2018, Peter immediately acknowledged his role, and made clear that he would appear in the United States to face and resolve the charges. Although forcing the government to seek extradition was a viable legal option (see Section II.B.2, below), Peter was adamant from the outset that he would not cause the government to undertake such efforts, as he would appear in the United States voluntarily. Indeed, he offered to cooperate with the government's investigation and provide whatever information he had.

However, due to his limited role at Beaufort and lack of involvement in other illegal activity, he did not have any substantial information to advance the government's investigation.

LEGAL ANALYSIS

I. THE ADVISORY SENTENCING GUIDELINES CALCULATION

Sentencing Guidelines Section 2X1.1 governs the two conspiracy charges. Pursuant to Section 2X1.1(a), the base offense level is that of the guideline for the substantive offense, plus any adjustments from that guideline section for any intended offense conduct "that can be established with reasonable certainty." U.S.S.G. § 2X1.1. Here, the parties agree that the guideline for the substantive offense is Section 2B1.1, and that the applicable base offense level is 6 pursuant to Section 2B1.1(a)(2). The government seeks a 16-level enhancement for intended loss under Section 2B1.1(b)(1)(I), and a 2-level enhancement under Section 2B1.1(b)(10). For the reasons set forth below, neither enhancement applies.

A. The Loss Amount Is Less Than $6,500

For a conspiracy offense, the standard in determining whether any additional offense characteristics apply is whether any intended offense conduct "can be established with reasonable certainty." U.S.S.G. § 2X1.1(a). As reflected in Application Note 2 to Section 2X1.1, the "only specific offense characteristics from the guideline for the substantive offense that apply are those that are determined to have been specifically intended or actually occurred. Speculative specific offense characteristics will not be applied."

1. The Stock Trades

On four dates in January and February 2018, based on instructions from the undercover agent, Mr. Kryiacou requested that a Beaufort Securities trader execute small trades in HD View stock. The chart below identifies the date of each trade, the number of shares traded on behalf of

the undercover agent and, based on publicly available information, the opening and closing prices for each date and the total market volume traded in the stock on each date:

Date	Traded Shares	Open Price	Close Price	Change	Market Volume Traded
1/4/2018	1,000	$0.43	$0.73	$0.30	18,283
1/5/2018	1,250	$0.72	$0.73	$0.00	1,820
1/31/2018	1,000	$0.63	$0.60	-$0.03	2,000
2/2/2018	1,000	$0.60	$0.64	$0.04	1,000

In total, this amounted to less than $3,000 worth of stock transactions over the course of the four days. As this information reflects, other than on January 4, the trading had no or virtually no impact on the volume of trading by the market or the share price on each date. With respect to the first date, even assuming the trade caused the entire increase in the stock price that day, and even assuming that the change in price can be considered loss with respect to the remaining 17,283 shares traded in the market that day, the resulting loss amount is $5,185. An alternative measure is to consider the gain to the undercover's account. Based on the opening and closing prices of the day and the amount of shares traded, the gain to the undercover's account from the trading could not have been more than $300 on the first day, $0 on the second day, a loss of $30 on the third day, and $40 on the final day. Based on that minimal impact, and the absence of any real impact to both price and volume by the trading on January 5, January 31, and February 2, there is no basis to conclude that Mr. Kyriacou would have intended more significant losses (or gain), much less losses (or gain) in the millions of dollars.

Because the loss amount is, at best, less than $6,500, pursuant to Section 2B1.1(b)(1)(A) the offense level does not increase.

2. The Government Cannot Establish A Higher Intended Loss Figure With Any Reasonable Certainty

The government's proposed 16-level enhancement, based on an intended loss of more than $1,500,000 but less than $3,500,000 pursuant to U.S.S.G. § 2B1.1(b)(1)(I), is entirely speculative, and certainly cannot be established "with reasonable certainty." There is no dispute that such losses did not actually occur, and there is no basis to determine that Mr. Kyriacou "specifically intended" such losses. *See* U.S.S.G. § 2X1.1 (Application Note 2).

Even if the specific intent requirement of Section 2X1.1 was not applicable (it is), "[i]n determining a loss amount for purposes of Guidelines calculation, a district court's findings must be grounded in the evidence and not derive from mere speculation." *United States v. Coppola*, 671 F.3d 220, 249 (2d Cir. 2012). "The Government carries the burden of establishing 'disputed factual allegations ... by a preponderance of the evidence,' *i.e.*, that the factual issue in question is 'more likely than not true.'" *United States v. Rigo*, 86 F. Supp. 3d 235, 241 (S.D.N.Y. 2015) (quoting *United States v. Rizzo*, 349 F.3d 94, 98 (2d Cir. 2003)). While a district court need not calculate loss with "absolute precision," the calculation must be "a reasonable estimate of the loss given the available information." *United States v. Villa*, 744 F. App'x 716, 721 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 1580, 203 L. Ed. 2d 739 (2019) (quoting *United States v. Binday*, 804 F.3d 558, 595 (2d Cir. 2015) (internal quotation marks omitted)).

Here, the only basis for the government's position that the intended loss amount should be millions of dollars is that the undercover agent stated his own grand intentions (obviously false) to execute trading schemes generating millions of dollars. Mr. Kyriacou never expressed his own intention to do so. The agent's wild puffery is entirely inconsistent with the few trades that actually happened and insufficient to hold Mr. Kyriacou accountable for millions of dollars of intended

loss.[3] *See, e.g.*, *United States v. Grace*, 568 F. App'x 344, 356 (5th Cir. 2014), *as revised* (May 22, 2014) (vacating sentence and remanding to the district court for a recalculation of the appropriate loss amount, where "the intended loss calculation of $3 million was based on an [undercover] agent's statement to [the defendant] that the [Private Investor] Letter would be used to raise $2–3 million in capital" and the defendant was only "paid $8,000 in exchange for providing the Letter"); *see also United States v. Kirincic*, No. 04 CR 409(LMM), 2007 WL 3195157, at *5 (S.D.N.Y. Oct. 30, 2007) (rejecting the government's argument that "[e]ventually, whether it be tomorrow or many years down the road, the money would leave" the insurance company, as "simply speculation," explaining that "nothing in the Guidelines or the case law cited by the parties, or by the Court, suggests that such reasoning from supposed future events should be used in a Guidelines calculation"). Of course, the stated intent of the undercover agent is irrelevant, as a government agent is not a co-conspirator. *See, e.g.*, *United States v. McGowan*, 58 F.3d 8, 14 (2d Cir. 1995) (an agent pretending to conspire while acting in an undercover capacity for the government is not a bona-fide conspirator). Thus, the government must present evidence that Mr. Kyriacou or other co-conspirators actually intended to perpetuate a scheme on the scale the undercover agent suggested.

In an analogous stock fraud case involving a government informant, *United States v. Altomare*, the court did not credit such wild speculation about potential profits as a basis to calculate intended loss amount. 673 Fed. Appx. 956 (11th Cir. 2016). In *Altomare*, the defendant

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3. Nor should the Court rely on the Probation Department's calculation of intended loss because the PSR does not undertake any analysis of the intended loss attributable to Mr. Kyriacou. The PSR merely states that "[t]he Government advised that Kyriacou is responsible for an intended loss of more than $1,500,000 but less than $3,500,000." PSR ¶ 35. *See United States v. Thomsen*, 830 F.3d 1049, 1072 (9th Cir. 2016) (vacating sentence and remanding to the district court to make factual findings supporting the amount of intended loss, where it was "difficult to tell what the evidentiary basis for the $425,117 intended loss might be, beyond the prosecutor's statements to the probation officer").

was approached by a former business associate who was then working as an FBI informant. *Id.* at 958-59. The two discussed pumping the price of a stock called Sunset. *Id.* at 959. As described in the opinion, the defendant in *Altomare*, unlike Mr. Kyriacou here, took numerous and sophisticated steps to artificially inflate Sunset's share price. *Id.* at 965. The district court ultimately calculated an intended loss of between $70,000 and $120,000 based on actual trading, the amount of shares controlled by the defendant, and the intent to inflate the stock price by $1 per share. *Id.* at 964.

Notably, the district court in *Altomare* did not base the loss calculation on the defendant's "stated ambition" of controlling a larger amount of shares and inflating the share price by up to $9 per share. *Id.* at 964 n.2. The district court's application of the loss amount provision in *Altomare* is instructive here. In *Altomare*, the stated ambition was specific as to a particular stock, an amount of shares and a defined increase in stock price, whereas in our case there was no such specific discussion. Moreover, in *Altomare* the stated yet ignored ambition was that of the defendant, whereas here the less specific ambition was that of the government agent. Finally, the district court in *Altomare* took the more reasonable view of intended loss despite the defendant's affirmative role in causing all of the necessary elements of the intended pump and dump to occur. For example, the defendant there caused shares to be issued to the informant at a discounted price, arranged for another person to participate through a buy-ratio agreement, instructed the informant to create a sham loan agreement to disguise the income, and drafted press releases intended to help pump the stock price. *Id.* at 965. By contrast, Mr. Kyriacou took no such steps, and merely placed the agent's stock order with his firm's trader. Given that minimal role, he should at least get as much of the benefit of the doubt when calculating intended loss amount as the defendant in *Altomare*, if not significantly more consideration.

In short, the government cannot establish what Application Note 2 to Section 2X1.1 requires—loss which "actually occurred" or was "specifically intended" by the defendant. Section 2X1.1 of the Guidelines directs that "[s]peculative specific offense characteristics will not be applied", yet that is precisely what the government urges the Court to do here. The government's speculative proposed loss amount cannot form the basis of an enhancement under Section 2B1.1(b).

B. A Substantial Downward Variance Is Warranted If the Court Accepts the Government's Loss Calculation

Courts have expressed the belief that "the Sentencing Commission's loss-enhancement numbers do not result from any reasoned determination of how the punishment can best fit the crime, nor any approximation of the moral seriousness of the crime." *United States v. Johnson*, No. 16-CR-457-1 (NGG), 2018 WL 1997975, at *3 (E.D.N.Y. Apr. 27, 2018); *United States v. Gupta*, 904 F. Supp. 2d 349, 351 (S.D.N.Y. 2012) ("Another example of the deviation of the Guidelines from the original goals of the Sentencing Commission—and one more directly relevant to the instant case—is the huge increase in the recommended Guidelines sentences for securities fraud cases. The Guidelines' calculations for this offense are no longer tied to the mean of what federal judges had previously imposed for such crimes, but instead reflect an ever more draconian approach to white collar crime, unsupported by any empirical data.").

Consistent with this belief, courts in the Second Circuit have not hesitated to disagree with Guidelines calculations and imposed sentences far below the advisory guideline range in order to avoid injustice. For example, in *United States v. Adelson*, a stock manipulation case, where the guidelines calculation was based on a $260 million loss, the court disagreed with the guidelines results finding that they place an "inordinate emphasis on the loss calculations" and were "wildly off-base." 441 F.Supp. 2d 506, 509, 515 (S.D.N.Y 2006), *aff'd* 301 Fed. App'x 93 (2d Cir. 2008).

The *Adelson* court explained, "where as here, the calculations under the guidelines have so run amok that they are patently absurd on their face, a Court is forced to place greater reliance on the more general considerations set forth in section 3553(a), as carefully applied to the particular circumstances of the case and of the human being who will bear the consequences." *Id.* at 515. *See also United States v. Corsey*, 723 F.3d 366, 378 (2d Cir. 2013) (finding 20 year sentences for $300 billion dollar fraud was "not merely harsh" but "dramatically more severe than c[ould] be justified"); *United States v. Parris*, 573 F. Supp. 2d 744, 745 (E.D.N.Y. 2008) (finding that the fraud guidelines "have so run amok that they are patently absurd on their face"); *United States v. Ferguson*, 584 F.Supp. 2d. 447 (D. Conn. 2008) (court gave five defendants sentences ranging from one year and one day to four years' incarceration for their role in a $500 million fraud despite an advisory guideline range of life in prison). Indeed, in *United States v. Algahaim*, the Second Circuit itself remanded a fraud case for resentencing, inviting district courts to consider non-Guidelines sentences where a low base offense level for a fraud offense is dwarfed by a loss enhancement. 842 F.3d 796, 800 (2d Cir. 2016) (recognizing the imbalance of a base offense level of six for fraud with a 12-level enhancement for loss amount, which amounted to a three-fold increase in the defendant's offense level).

A non-guidelines sentence is particularly appropriate here, where the advisory guidelines range, as suggested by the government, is primarily driven by an unreasonable reliance on the loss amount and is "patently absurd." The suggested loss enhancement alone represents a near four-fold increase in Mr. Kyriacou's offense level, and screams out for a substantial variance from the Guidelines. *See Algahaim*, 842 F.3d at 800.

C. Section 2B1.1(b)(10) Does Not Apply

Section 2B1.1(b)(10) provides for a two-level enhancement if:

(A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials;

(B) a substantial part of a fraudulent scheme was committed from outside the United States; or

(C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means.

The government seeks a 2-level enhancement under either subsection (B) or (C) (*see* PSR ¶ 44), neither of which should be applied here.

It is hard to quibble with the fact that the literal words of subsection (B) apply to the facts of this case, although that would be true for any case in which the government investigates foreign individuals who work for foreign employers, a common occurrence in recent times. Because the Sentencing Commission could not possibly have intended to punish a foreign citizen more harshly than a U.S. citizen simply because the foreigner lives and works abroad, the subsection must, and indeed does, mean more. The original predecessor to Section 2B1.1(b)(10), the old Section 2F1.1(b)(5), was promulgated in 1998 in response to Congress' directive to the Sentencing Commission under the Telemarketing Fraud Prevention Act of 1998. As part of an effort to combat telemarketing fraud, Congress directed the Commission to "provide an additional appropriate sentencing enhancement, if the offense involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States." Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-184, § 6(c)(2), 112 Stat. 520, 521 (1998). That directive resulted in what is now Section 2B1.1(b)(10).

The Sentencing Commission explained that the relevant portion of Sentencing Guidelines Amendment 577 was "to provide an increase for fraud offenses that involve conduct, such as sophisticated concealment, that makes it difficult for law enforcement authorities to discover the offense or apprehend the offender." *See* U.S. SENTENCING GUIDELINES MANUAL app. C, ammnd.

577 (U.S. Sentencing Comm'n 2016), at 506. The Commission further noted that subsections (A) and (B) of this new enhancement "address conduct that the Commission has been informed often relates to telemarketing fraud," that the "fraudulent telemarketers increasingly are conducting their operations from Canada and other locations outside the United States," and that "telemarketers often relocate their schemes to other jurisdictions once they know or suspect that enforcement authorities have discovered the scheme. Both types of conduct are specifically covered by the new enhancement." *Id.* Not surprisingly, the commentary to the new enhancement focused (and still does) on the use of multiple locations for telemarketing operations as an example of conduct warranting an enhancement.

While the enhancement is not limited to telemarketing cases, its application must address fraud schemes in which the location or relocation of the criminal conduct was intended as a sophisticated method to avoid detection in the United States. Here, the conduct was not located or relocated outside of the United States for such a purpose. Rather, Mr. Kyriacou's foreign location was a mere consequence of where he was born and lived his entire life, and where he also obtained employment – in England. The conduct involved foreign activity because the undercover operation decided to reach out and initiate discussions with a foreigner working abroad. Mr. Kyriacou's clients at Beaufort, other than the undercover agent, were Europeans trading in European stocks on European exchanges. There is nothing about Mr. Kyriacou's place of residence or place of employment that warrants a sentencing enhancement, and to apply an enhancement under subsection (B) would not serve either Congress' goal in requiring the Commission to promulgate the enhancement, or the Commission's goal in doing so.

Nor is subsection (C) applicable to Mr. Kyriacou. Subsection (C) requires both that the offense conduct involved sophisticated means and that the individual defendant "intentionally

engaged in or caused the conduct constituting sophisticated means." The second prong of subsection (C) was added to the Guidelines in 2015, as the Sentencing Commission concluded that "basing the enhancement on the defendant's own intentional conduct better reflects the defendant's culpability." *See* April 30, 2015 Amendments to the Sentencing Guidelines, at 29-30. Mr. Kyriacou did not seek to employ sophisticated means as part of the alleged securities fraud. He merely instructed a trader to execute a trade of a certain amount of stock, as directed by the undercover agent. This is no more sophisticated than any run-of-the-mill stock trade. For these reasons, a 2-level enhancement under Section 2B1.1(b)(10) does not apply.

D. The Total Offense Level and Corresponding Sentencing Range

With a base offense level of 6, no applicable enhancements, and a 2-level reduction for acceptance of responsibility pursuant to Section 3E1.1(a),[4] the total offense level should be 4. Because Mr. Kyriacou has no prior offenses and thus no criminal history points, the corresponding Guidelines range should be 0 to 6 months, and in Zone A.

II. THE § 3553(a) FACTORS CALL FOR A NON-GUIDELINES SENTENCE

In fashioning an appropriate sentence, the Supreme Court has made abundantly clear that a district court must consider all Section 3553(a) factors prior to making a decision, not just the Sentencing Guidelines calculations. *See Gall v. United States*, 552 U.S. 38, 49-50 (2007). Indeed, since its seminal holding in *United States v. Booker*, finding that the then-mandatory Sentencing Guidelines system violated the Sixth Amendment, the Supreme Court has stressed the advisory nature of Guidelines. 543 U.S. 220, 226-46 (2005). The Guidelines "now serve as one factor

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4. To the extent the Court calculates an adjusted offense level of 16 or more prior to application of Section 3E1.1(a), then the Court should apply an additional 1-level decrease pursuant to Section 3E1.1(b). (*See* PSR ¶ 51).

among several courts must consider in determining an appropriate sentence." *Kimbrough v. United States*, 552 U.S. 85, 90 (2007).

A within-guidelines sentence, without equal consideration to all the Section 3553(a) factors, is no longer presumed to be reasonable. *See Nelson v. United States*, 555 U.S. 350 (2009) (citations omitted). As the *Nelson* Court emphasized:

> Our cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable. In *Rita* we said as much, in fairly explicit terms: 'We repeat that the presumption before us is an appellate court presumption . . . . [T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.' And in [*Gall*] we reiterated that district judges, in considering how the various statutory sentencing factors apply to an individual defendant, 'may not presume that the Guidelines range is reasonable.'

Id. at 352.

Section 3553(a) specifically instructs district courts to "impose a sentence sufficient, but not greater than necessary" to accomplish the goals of sentencing. 18 U.S.C. § 3553(a). *See Kimbrough*, 552 U.S at 101 (citing the sentencing goals outlined at 18 U.S.C. § 3553(a)(2)(A)-(D)). The court must consider the following: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed: (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the advisory guideline range; (5) any pertinent policy statement issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities; and (7) the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553 (a)(1)-(7).

The district court must make an "'individualized assessment' of the appropriate sentence 'based on the facts presented' and the factors detailed in §3553(a)." *United States v. Jones*, 531 F.3d 163, 182 (2d Cir. 2008). Moreover, when a sentencing court finds that the Guidelines fail to properly reflect the Section 3553(a) factors, reflect "unsound judgment" or when "the case warrants a different sentence regardless," the judge is free to disagree with the guideline calculations and impose a reasonable sentence. *See Rita v. United States*, 551 U.S 338, 351, 357 (2007). The Supreme Court subsequently clarified this discretion:

> [E]ven when a particular defendant . . . presents no special mitigating circumstances -- no outstanding service to country or community, no unusually disadvantaged childhood, no overstated criminal history score, no post-offense rehabilitation -- a sentencing court may nonetheless vary downward from the advisory guideline range . . . . The only fact necessary to justify such a variance is the sentencing court's disagreement with the guidelines . . . .

Spears v. United States, 555 U.S. 261, 263-64 (2009).

Here, a non-custodial sentence is appropriate in light of the Section 3553(a) factors.

A. The Nature and Circumstances of the Offense Support A Non-Custodial Sentence

Mr. Kyriacou accepts full responsibility for his actions and recognizes the severity of his conduct. However, a non-custodial sentence is warranted given the following unique "nature and circumstances" of this case. 18 U.S.C. § 3553(a)(1).

First, Mr. Kyriacou did not initiate this conduct. Rather, the securities fraud scheme was concocted, initiated and pursued by the FBI to further an ongoing investigation of Beaufort based on allegations of illicit conduct against that entity that preceded Mr. Kyriacou's employment there and in which there is no allegation that Mr. Kyriacou was involved. It is only because the FBI's initial contact with Beaufort was randomly assigned to him that Mr. Kyriacou is involved in this case at all. At the time of his first call with the confidential source, Mr. Kyriacou had no intention

of conducting business in the U.S. or with a U.S. citizen. Moreover, Mr. Kyriacou did not initiate the many calls and meetings referenced in the PSR; in each instance, it was the undercover agent and/or the confidential source who initiated the activity with Mr. Kyriacou. If the undercover agent had not continued to initiate the calls and meetings with Mr. Kyriacou, Mr. Kyriacou would not have pursued the scheme proposed by the undercover agent.

Second, Mr. Kyriacou did not join the conspiracy for purposes of greed. Rather, he was simply looking to attain a new, and perhaps his first, client for his employer. Unlike defendants in other fraud cases, Mr. Kyriacou did not obtain any monetary gain from his actions. Nor did he intend to reap substantial profits from his conduct. In contrast to most participants in pump and dump schemes, Mr. Kyriacou received no financial incentive tied to the scheme's success. In addition, as recognized by the government and noted in the PSR (¶ 37), because the conspiracy was initiated by an undercover agent, there were no victims in this case. Finally, this is not a case involving any violence or danger to the community, or any hint of such violence or danger in the future.

B. Mr. Kyriacou's Personal History and Characteristics Support a Non-Custodial Sentence

Section 3553(a) also requires the Court to evaluate the "history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). In making this assessment, a sentencing judge is "to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall,* 552 U.S. at 52 (citing *Koon v. United States*, 518 U.S. 81, 98 (1996)). Thus, while Mr. Kyriacou stands convicted before this court as a first time-offender, the manner in which he led and continues to lead his life and interact with others is a critical consideration.

1. Mr. Kyriacou is a First-Time Offender Who Has Led An Otherwise Positive Life

Prior to and since the charges in this case, Mr. Kyriacou has had no other brush with the law. He has worked hard in school and at work to succeed, and has overcome various challenges along the way to do so. He is committed to his family and community, and they are likewise committed to him. Other than the instant offense, there is nothing in Mr. Kyriacou's background that should give the Court reason to believe that he requires imprisonment to set him on a straight path. Indeed, the fact that Mr. Kyriacou, despite the shame from his conduct, has been forthcoming with his family, his community, and his new employer about his circumstances is a strong indication that he can be trusted to steer clear of any trouble in the future.

2. Mr. Kyriacou Immediately Took Responsibility, Tried to Cooperate, and Waived Extradition

The Court should also give considerable weight to Mr. Kyriacou's response to the charges. He immediately accepted responsibility for his actions, and attempted to cooperate with the government's investigation. While cooperation did not materialize, it was not a result of any lack of willingness on Mr. Kyriacou's part. Rather, because Mr. Kyriacou did not participate in other illegal conduct at Beaufort, he simply did not have sufficient information to help the government advance a case against others.

Mr. Kyriacou also made clear from the outset that he did not wish to challenge any potential extradition, and thus saved the government from the time, effort, and resources necessary to seek extradition. He did so notwithstanding that he had a potentially significant legal challenge to any extradition from England. On July 31, 2018, in connection with the charges in *United States v. Stuart Scott*, Cr. No. 16-457 (NGG) (E.D.N.Y.), another Eastern District prosecution of an UK national, the UK High Court of Justice denied extradition of Mr. Scott, and in October 2018, UK's highest appellate court denied further appeal by the United States. The High Court's decision was

grounded primarily on the fact that the conduct and most of the alleged harm in that case took place in England, not the United States. This was despite that fact that Mr. Scott's co-defendant, Mark Johnson (also a UK citizen), was tried and convicted in the Eastern District. Here, Mr. Kyriacou's conduct was based entirely in the UK, and there was no harm to victims anywhere, making it even more likely that the UK courts would have denied extradition of Mr. Kyriacou to the United States.[5]

C. A Non-Custodial Sentence Would Reflect the Seriousness of the Offense and Provide Adequate Deterrence

In fashioning an appropriate sentence, the Court must also consider the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant. 18 U.S.C. § 3553(a)(2). In Mr. Kyriacou's case, all of these purposes are properly served by a non-custodial sentence.

1. A Non-Custodial Sentence Would Properly Reflect the Seriousness of the Offense

Under the unique circumstances of Mr. Kyriacou's offense, a probationary sentence would reflect the seriousness of the offense, promote respect for the law, and provide just punishment. As the Supreme Court has recognized, "[o]ffenders on probation are [] subject to several standard conditions that substantially restrict their liberty." *Gall*, 552 U.S. at 48-49; *see also United States v. Leitch*, No. 11-CR-00039 JG, 2013 WL 753445, at *12 (E.D.N.Y. Feb. 28, 2013) ("In addition to standard and special conditions, there is an array of alternative sanctions—home confinement,

5. In addition, with respect to the original money laundering charges, there is no crime in the UK akin to 18 U.S.C. § 1956(a)(3), and thus there would have been no dual criminality to permit extradition on the money laundering charges.

community service, and fines, for example—that allow judges to impose enhanced (and sometimes even constructive) punishment without sending the defendant to prison."). Here, a non-custodial sentence will constitute just punishment, adequately reflect the seriousness of the offense, and promote respect for the law. Mr. Kyriacou will still bear the stigma of a felony conviction as well as loss of employability in his chosen profession and reputation and other collateral consequences, as described more fully below.

2. Consideration of Other Collateral Consequences

Prior to fashioning an appropriate sentence, the Second Circuit has expressly instructed district courts to take into consideration the collateral consequences of a particular sentence. "It is difficult to see how a court can properly calibrate a 'just punishment' if it does not consider the collateral effects of a particular sentence." *United States v. Stewart*, 590 F.3d 93, 141 (2d Cir. 2009). The collateral effects of a conviction and sentence are varied depending on the case and the defendant's history. For example, potential deportation, loss of a defendant's career and livelihood, separation from family, mental health consequences, loss of reputation and conditions of incarceration, are some of the factors a court should consider prior to imposing a sentence. *See United States v. Thavaraha*, 740 F.3d 253, 262-63 (2d Cir. 2014) (taking into consideration impact of deportation); *Stewart*, 590 F.3d at 141 (recognizing destruction of a defendant's career and livelihood as collateral consequence).

In determining a just punishment in Mr. Kyriacou's individual circumstances, the fact that he has already suffered substantial collateral consequences also supports a probationary sentence. As a result of the public nature of the charges against him, Mr. Kyriacou lost his job and is no longer able to work in his chosen field. Moreover, as noted in the PSR (¶ 67) and letters in support, Mr. Kyriacou has suffered mental and emotional health symptoms as a result of his arrest and conviction.

As a foreign national, any term of imprisonment would necessarily be harsher on Mr. Kyriacou than that of a United States citizen. Given the lack of any criminal history and the nature of the offense, it is highly likely that Mr. Kyriacou would be designated by the Bureau of Prisons to a camp facility, if not for his foreign status. Because he is foreign, however, Mr. Kyriacou would not be eligible for a camp facility, as he will be deemed a "deportable alien," which necessarily entails a security designation above the minimum for a camp facility. This will also cause an unnecessary ICE detainer and deportation proceeding.

3. A Non-Custodial Sentence Would Afford Adequate Deterrence and Protection to the Public

Pursuant to Section 3553(a), the Court is also required to consider whether the sentence imposed is needed to provide specific and general deterrence or to protect the public from further crimes of the defendant. 18 U.S.C. § 3553(a)(2)(B) & (C). In this case, a non-custodial sentence will sufficiently achieve specific and general deterrence. *See United States v. Harris*, No. 12-CR-448, 2013 WL 5739202, at *3 (E.D.N.Y. Oct. 22, 2013) (concluding that general and specific deterrence were satisfied by a sentence of two years supervised release, reasoning that the "sentence will send a clear message that any involvement in securities fraud will result in punishment, including financial penalties" and "the impact of this guilty plea on the defendant's employability and the loss of his ability to remain in the United States" makes it "unlikely that the defendant will engage in further criminal activity in light of his sincere remorse").

Specific deterrence is achieved by sending a message to a defendant that his criminal actions have consequences. Mr. Kyriacou has received this message and endured the consequences of his actions. Mr. Kyriacou has been forthcoming about his circumstances with his family, his friends, and his employer, demonstrating sincere remorse and acceptance for his

actions. As such, the Court can have a high degree of confidence that Mr. Kyriacou will not commit future crimes.[6]

A probationary sentence will still serve general deterrence purposes because the message to potential offenders is clear that similar criminal conduct will result in substantial consequences – being branded a felon for life; the loss of one's job and career; a shattered reputation; the anxiety and depression of living with a criminal investigation hanging over one's head; and the terrible emotional toll on one's family. *See* Sentencing Tr. at 90, *United States v. Connolly*, 16 CR 370 (CM) (S.D.N.Y. Oct. 24, 2019) ECF No. 425 (concluding that the fact that defendant traders who were convicted of rigging LIBOR submissions endured "arrest,...the loss of jobs and employability, the financial stress on them and their families, [and] the loss of status in the community" was sufficient to accomplish general deterrence of other traders in securities markets and therefore incarceration was unnecessary).

Lastly, as the letters submitted make clear, Mr. Kyriacou is not a criminal from whom the public needs protection. Mr. Kyriacou has demonstrated sincere remorse and acceptance for his actions and is determined to remain a positive and productive member of society. As a first-time offender, Mr. Kyriacou is statistically similar to other Category I offenders and is not likely to recidivate. Moreover, Mr. Kyriacou has a high level of education, has been employed since he was 22, does not use drugs, and has close relationships with his parents and siblings. He has also shown a determination to become and remain a part of the workforce regardless of whether he can

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6. Even though there is no reason to believe that Mr. Kyriacou would become involved in future criminal activity anywhere, the fact that he lives in a foreign country and had no real contact with the U.S. markets other than his interaction with the undercover agent even further diminishes the likelihood that he would ever commit another crime in the United States. *See* Sentencing Tr. at 40, *United States v. Saltsman*, 07 CR 641 (NGG) (E.D.N.Y. July 28, 2010) ECF No. 163 (in assessing risk of recidivism and need for specific deterrence, foreign resident defendant who planned to return to his home country following sentencing "certainly does not create a risk to anyone here").

work in the securities industry. Based on these variables, Mr. Kyriacou is in the lowest risk factor, with almost no chance of committing future crimes, according to the Sentencing Commission report on recidivism. United States Sentencing Commission, *Recidivism Among Federal Offenders: A Comprehensive Overview* (2016) (reporting that recidivism rates decrease with educational level; and that first-time offenders and fraud offenders are less likely to reoffend than offenders with criminal histories and offenders convicted of other federal crimes).[7]

D. The Court Should Employ Alternatives to Incarceration

Section 3553(a) also requires the Court to consider "the kinds of sentences available" in a given case. 18 U.S.C. § 3553(a)(3). As this Court has emphasized, "[i]n view of the excessive incarceration rates in the recent past and their unnecessary, deleterious effects on individuals sentenced, society and our economy, justifiable parsimony in incarceration is prized." *United States v. Chica-Villada*, No. 15-CR-445, 2015 WL 5773964, at *2 (E.D.N.Y. Sept. 30, 2015). Moreover, this Court, as well as other judges, have recognized how punitive even a short prison sentence is. *See Johnson*, 2018 WL 1997975, at *5 ("let me be clear: any amount of prison time is a serious amount of prison time").

A custodial sentence would impede the positive progress Mr. Kyriacou has made since the indictment. Despite losing his job and the ability to work in his chosen field, Mr. Kyriacou has worked diligently to find new and different employment and remain a productive member of society. He did not consider himself entitled to work in a certain profession, but rather ensured that he would find paying work elsewhere. Incarceration in the U.S. would prevent Mr. Kyriacou from returning to his country where he can continue his life as a productive member of society.

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7. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

See Chica-Villada, 2015 WL 5773964, at *2 (concluding that a "custodial sentence is unnecessary" where "[i]mprisonment will harm the defendant by preventing him from returning to his country where he can continue with his life"). He also has no family in the United States, and thus any visitation while incarcerated would be extremely limited and difficult. By contrast, a probationary sentence would allow Mr. Kyriacou to continue on the right path and, according to the Sentencing Commission report on recidivism, make him less likely to reoffend. United States Sentencing Commission, *Recidivism Among Federal Offenders: A Comprehensive Overview* (2016) ("Recidivism rates differ according to the type of sentence imposed. As previously noted, 81.2 percent of the study group were sentenced to some amount of imprisonment. These offenders had the highest rate of rearrest, 52.5 percent. Conversely, offenders sentenced to probationary sentences (18.8 percent of the study group) had a rearrest rate of 35.1 percent.").

If the Court imposes a probationary sentence, Mr. Kyriacou would request permission to serve his probation at home in London, since he has no family or place to stay in the United States, and his employment is in England. This Court and others have approved defendants who are residents of a foreign country serving their probation in their home countries. *See* Sentencing Tr. at 44, *United States v. Saltsman*, 07 CR 641 (NGG) (E.D.N.Y. July 28, 2010) ECF No. 163 (defendant to serve probation and perform community service in Israel); Sentencing Tr. at 92, 95, *United States v. Connolly*, 16 CR 370 (CM) (S.D.N.Y. Oct. 24, 2019) ECF No. 425 (defendant to serve probation and home confinement in United Kingdom); Judgment, *United States v. Yabe*, 18 CR 726, (D.N.J. May 22, 2019) ECF No. 14 (defendant to serve probation in Japan); Sentencing Tr. at 16-17, *United States v. Curtler*, 15 CR 670 (CM)) (S.D.N.Y. April 9, 2019) ECF No. 28 (defendant to serve probation in United Kingdom); *United States v. Stewart*, 14 CR 272 (JSR) (S.D.N.Y. Feb. 8, 2017 and Feb. 22, 2017) ECF Nos. 275, 277 (defendant to serve probation in

United Kingdom); *United States v. Yagami*, 14 CR 272 (JSR) (S.D.N.Y. Feb. 21, 2017 and March 13, 2017) ECF Nos. 276, 282 (defendant to serve probation in Hong Kong); *United States v. Robson*, 14 CR 272 (JSR) (S.D.N.Y. Nov. 21, 2016) ECF No. 267 (defendant to serve probation in United Kingdom); *United States v. Gardellini*, 545 F.3d 1089, 1091 (D.C. Cir. 2008) (district court permitted defendant to serve probation in Belgium).

E. Imposing a Custodial Sentence On Mr. Kyriacou Would Create Unwarranted Sentencing Disparities

In determining the correct sentence, the Court must also consider "the need to avoid unwarranted sentenc[ing] disparities." 18 U.S.C. § 3553(a)(6). This consideration involves both sentences imposed on other defendants in the same case and sentences imposed in similar cases. An analysis of both supports the conclusion that a custodial sentence would result in unwarranted sentencing disparity.

Mr. Kyriacou is the third defendant to be sentenced in this case. The first two, Adrian Baron and Arvinsingh Canaye, each received time served, albeit after having spent some time in prison upon arrest. As reflected in the record, the Guidelines calculation for both sentenced defendants was significantly higher and the court applied a much lower sentence after applying the Section 3553(a) factors. Although Mr. Kyriacou did not serve time in prison prior to his guilty plea (other than being locked up and handcuffed throughout the day of his guilty plea), that is because from the outset of this case, Mr. Kyriacou made clear that he would voluntarily appear in the United States to enter a guilty plea, and thereby save the government the time, effort, and resources in seeking extradition from the United Kingdom.

Imposing a term of imprisonment would also create a particularly unjust outcome in relation to those at Beaufort Securities whom the government's investigation intended to target but who were never charged, much less convicted and served time. As noted in the PSR, the

government has information that others at Beaufort Securities committed various pump and dump schemes generating tens of millions of dollars, pre-dating Mr. Kyriacou's arrival at that firm. (PSR ¶ 7). It seems clear that the government's undercover investigation intended to target those responsible for such illegal activity, including the leadership of Beaufort, as opposed to Mr. Kyriacou, the most junior person at the firm to whom the FBI's first inquiry was randomly assigned. Yet none of those responsible have been charged, much less convicted of a felony. The Court should consider this type of disparity as well.

The disproportionate impact that the loss amount enhancement has on the Guidelines offense level in this case is quite common in the Second Circuit. Aside from the cases described previously, below are a few illustrative cases for the Court to consider in order to avoid "unwarranted disparities."

- *United States v. Johnson*, No. 16 Cr. 457 (E.D.N.Y.): former London-based HSBC foreign exchange executive was convicted on eight counts of wire fraud and conspiracy for participating in a fraudulent $3.5 billion currency swap. Notwithstanding the $3.1 million loss calculation based on HSBC's gain from the offense and the government's request for a seven-year sentence, the court sentenced Johnson well below the guidelines.[8] Making it clear that he did not agree with the effect of loss enhancements in white collar sentences, Judge Garaufis sentenced this first-time offender to two years' incarceration.

- *United States v. Block*, No. 16 Cr. 595 (S.D.N.Y.): the former CFO of a publicly traded real estate investment trust was convicted of manipulating the company's financial results by fraudulently inflating a key performance metric used by investors. Probation assessed the loss at $3 billion, resulting in a guideline range of life imprisonment. The court concluded that while it was clear the defendant's fraud directly caused significant shareholder losses, the calculation was not sufficiently reliable, and the court declined to impose a loss enhancement. Noting, among other things, that the defendant had otherwise led a law-abiding life, and had been punished by the loss of his

8. Notably, in the *Johnson* case, the government did not seek, and the Court did not impose, an enhancement for foreign conduct under Section 2B1.1(b)(10), notwithstanding that Johnson's conduct (like Mr. Kyriacou's here) took place in London.

profession, the court imposed a sentence principally of 18 months' imprisonment.

- *United States v. Greebel*, No. 15 Cr. 637 (E.D.N.Y.): former attorney at Katten Muchin Rosenman LLP who served as outside counsel to Retrophin, a pharmaceutical company founded by Martin Shkreli, was convicted of conspiracy to commit wire fraud and securities fraud for his role in two interrelated fraud schemes, in which Greebel, Shkreli and others stole millions of dollars in cash and stock from Retrophin and manipulated the price and trading volume of Retrophin stock. Notwithstanding the $14.4 million loss calculation, a personal profit of approximately $475,000, a guidelines range of 108 to 135 months, and the government's request for a 60-month sentence, the court sentenced Greebel significantly below the guidelines. Noting that more than half of the total offense level was driven by the loss amount calculations, upon which the guidelines provisions for fraud place excessive weight, the Court sentenced this first-time offender to a term of 18 months imprisonment.

- *United States v. Baynes*, No. 15 Cr. 139 (E.D.N.Y.): the owner of a tax return preparation business pleaded guilty to assisting in the preparation of fraudulent tax returns over a period of five years. Notwithstanding the $161,865 loss calculation based on the defendant's preparation of 74 false returns for paying clients, and the government's request for a sentence within the applicable guidelines range of 18 to 24 months, the Court sentenced Baynes well below the guidelines to a term of four years' probation.

- *United States v. Yu-Holguin*, No. 13 Cr. 259 (E.D.N.Y.): the defendant pleaded guilty to access device fraud conspiracy in relation to a global fraud scheme to steal bank account numbers from foreign banks and then use the compromised account numbers to withdraw funds from ATMs. Notwithstanding the $2.7 million loss calculation, a concession to personal responsibility for $60,000 in losses, and a guidelines range of 18 to 24 months, the court sentenced Yu-Holguin well below the guidelines. Finding that the loss guidelines would result in an overly punitive guideline sentence, and taking into account his relatively young age, education aspirations, solid work history, and the potential effect on his ability to become a naturalized US citizen, the Court sentenced this first-time offender to eight and a half months' incarceration with credit for time served.

These are but a few of the many examples of the courts in this Circuit eschewing the draconian Guidelines numbers in fraud cases. In accordance with these cases, a custodial sentence for Mr. Kyriacou would be contrary to that imposed on defendants in similar cases in this Circuit, particularly where his conduct resulted in no actual harm to investors, thus resulting in "unwarranted sentencing disparities."

Here, any sentence greater than a probationary one – whether it represents the bottom of the 0 to 6 months advisory range that we advance or a variance from the guideline range calculated in the PSR (¶ 81) and advanced by the government – would be "greater than necessary" to serve the purposes of sentencing Mr. Kyriacou. Statistics published by the Sentencing Commission indicate that, in the 2018 fiscal year, only 25.4% of defendants in the Eastern District and 25.5% of defendants in the Southern District of New York have been sentenced within the applicable guidelines range. U.S. Sentencing Commission, *2018 Annual Report and Sourcebook of Federal Sentencing Statistics* at Table 30, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-andsourcebooks/2018/Table30.pdf. Almost all offenders sentenced outside the guidelines range were sentenced below the range. *Id.* Accordingly, any sentence in the advisory guideline range advocated by the government would be plainly inconsistent with the treatment of other defendants in the Eastern District, the vast majority of whom are sentenced below the guidelines range.

III. A FINE IS NOT WARRANTED

We respectfully submit that Mr. Kyriacou's sentence should not include a fine. Pursuant to 18 U.S.C. § 3572(a), in addition to the Section 3553(a) factors, the Court must consider, *inter alia*, the following in determining whether to impose a fine, and the amount of, time for, and method of payment:

> (i) the defendant's income, earning capacity, and financial resources;
>
> (ii) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;
>
> (iii) any pecuniary loss inflicted upon others as a result of the offense;

. . .

(5) the need to deprive the defendant of illegally obtained gains from the offense.

These factors strongly militate against a fine here.

Because the offense conduct resulted in no loss, nor in any illegal gain to Mr. Kyriacou, a fine would not serve the objectives of Section 3572(a).[9] For those same reasons, there is no basis to order forfeiture or impose restitution.

Mr. Kyriacou's financial condition also weighs against imposing a fine. Mr. Kyriacou makes a modest income from his employment, and his prospects of finding more lucrative employment in the financial services industry are nonexistent as a result of his conviction. In addition, Mr. Kyriacou does not have any significant savings or any investment accounts.

If the Court, however, concludes that a fine is necessary, we respectfully submit that the applicable Guidelines fine range, based on the appropriate calculation of an offense level 4, is $500 to $9,500. *See* U.S.S.G. § 5E1.2(c)(3). We further note that if the Court accepts the PSR's Guidelines calculation of an offense level 21, the corresponding Guidelines fine range is $15,000 to $150,000 (PSR ¶ 90), and we respectfully submit that a below-Guidelines fine would be appropriate.[10]

CONCLUSION

For the foregoing reasons, we respectfully submit that a custodial sentence for Mr. Kyriacou would be "greater than necessary" to serve the statutory sentencing objectives. Instead,

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9. The PSR addresses only one of the identified factors: the expected costs to the government of any term of probation, or term of imprisonment and supervised release imposed. PSR ¶ 91 (citing U.S.S.G. § 5E1.2(d)(7) and 18 U.S.C. § 3572(a)(6)). We note that the costs identified by the Probation Department would be substantially reduced if the Court imposes a non-custodial sentence.

10. The final statutory factor required to be considered by the Court at sentencing, the need to provide restitution to victims of the offense (18 U.S.C. § 3553(a)(7)), is inapplicable here.

we request that, in light of the unique circumstances of Mr. Kyriacou's offense and his otherwise positive life, the Court exercise its discretion to impose a sentence of probation, and to permit Mr. Kyriacou to serve the sentence in his home country, which would punish Mr. Kyriacou sufficiently yet still permit him to rebuild his life and make a positive contribution to his community.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 27, 2020, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF. I also certify that this document is being served simultaneously on counsel of record in the manner specified, either by transmission of Notices of Electronic Filing generated by CM/ECF, or in another authorized manner.

s/Marc A. Weinstein
Marc A. Weinstein, Esq.